

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF PUBLIC HEARING
ARM 17.30.103, 17.30.106,)	ON PROPOSED AMENDMENT
17.30.108, and 17.30.109 regarding)	
401 Certification)	(WATER QUALITY)

TO: All Concerned Persons

1. On September 18, 2018, at 1:00 p.m., the Board of Environmental Review will hold a public hearing in Room 45 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Sandy Scherer, Legal Secretary, no later than 5:00 p.m., September 11, 2018, to advise us of the nature of the accommodation that you need. Please contact Sandy Scherer at the Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail sscherer@mt.gov.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.30.103 APPLICATION FOR CERTIFICATION (1) remains the same.

(2) An application for state water quality certification under this subchapter is not deemed complete until the permit fee required under ARM 17.30.201 is remitted to the department.

(2) remains the same, but is renumbered (3).

~~(3)~~ (4) The department may exempt an applicant from the information requirements of ~~(3)~~(2)(b), (c), and (e) of this rule, if the applicant's federal permit application is to the United States Army Corps of Engineers under section 404 of the federal Clean Water Act, 33 USC 1344, as amended, and the federal permit application provides the information required under these sections.

(4) and (5) remain the same, but are renumbered (5) and (6).

~~(6)~~ (7) An application is deemed complete if: the applicant has provided all information included in (3), and the fee required in (2).

~~(a) the department has not made a determination within 30 days after receipt of the application or, subsequent to receipt of the initial application, within 30 days of receipt of materials submitted by the applicant that supplement the application; or~~

~~(b) the department notifies the applicant that the application is complete.~~

AUTH: 75-5-401, MCA

IMP: 75-5-402, ~~75-5-403~~, MCA

REASON: The proposed amendments are necessary to clarify that an application for certification is deemed complete upon submission of the information required in (3) and the fee required in (2). The information and fee are both necessary to facilitate and support the department's review of the application for certification.

Under Section 401 of the Clean Water Act, federal agencies, most often the U.S. Army Corps of Engineers, issue permits authorizing discharges to navigable waters. Prior to the federal agency's issuance of a permit, it must receive certification from a state that the activity complies with state water quality standards. Under federal law, a state has a reasonable period of time, not to exceed one year, within which to provide certification. The 30-day timeframe within which the department is required to determine completeness under the current rule does not allow the department to coordinate its review with that of the federal agency. Additionally, the 30-day timeframe does not allow the department sufficient time and flexibility to work with the applicant, review the project for compliance with state water quality standards, and coordinate with the federal permitting agency regarding certification of an activity under Section 401 of the Clean Water Act, especially for more complex or controversial projects.

The proposed amendment to ARM 17.30.103 applies only to state certifications necessary for the issuance of a federal permit by a federal agency. The proposed amendment does not apply to the department's completeness review of applications for state-issued discharge permits under 75-5-403(1), MCA. Under this statute, the department has a maximum of 75 days to determine that an application for discharge permit is complete. An application is considered complete unless the applicant is notified of a deficiency within that review period.

17.30.106 TENTATIVE DETERMINATION BY THE DEPARTMENT (1) The department shall, within 30 days of receipt of a completed application, notify the applicant, the federal permitting or licensing agency, and the regional administrator of its tentative determination to either issue, issue with conditions, or deny certification. ~~If the department does not notify the applicant of a tentative determination within 30 days after the application is determined to be complete, the department is deemed to have waived certification.~~

(2) through (4) remain the same.

(i) remains the same but is renumbered (a).

(ii) (b) a statement of conditions which the department deems necessary for allowing the discharge, including: necessary monitoring requirements. ~~Necessary monitoring requirements include, but are not limited to:~~

~~(A) (i) at least 7 days prior to the beginning of the discharge, the applicant shall notify the department of intent to commence the discharge;~~ necessary monitoring requirements; and

~~(B) within 7 days after the completion of the discharge, the applicant shall notify the department of the completion; and~~

~~(C) (ii) the applicant shall~~ will be required to allow the department reasonable entry and access to the discharge site in order to inspect the discharge for compliance with the certification requirements applicable to the facility or activity.

(5) through (7) remain the same.

AUTH: 75-5-401, MCA

IMP: 75-5-402, ~~75-5-403~~, MCA

REASON: The federal permitting agency treats waivers as permanent even if the project changes and the department does not want to waive its Section 401 certification authority without proper consideration of potential project impacts. The proposed changes are necessary to prevent automatic waivers and ensure the department has the opportunity to review Section 401 certification projects for compliance with state water quality standards.

17.30.108 PUBLIC NOTICE AND FINAL DETERMINATION BY THE DEPARTMENT (1) Except as provided in ~~(5)~~ (6) of this rule, the department shall provide public notice of the department's tentative determination. The department shall mail the notice to:

(a) the applicant;

(b) federal, state, and local government agencies with jurisdiction over the location of the proposed discharge;

(c) affected states; and

(d) any person on request.

(2) In addition, the department shall publish a legal notice ~~once weekly~~ for 2 consecutive weeks ~~in a newspaper of general circulation that is circulated in the county in which the activity is proposed~~ on the department's web page. The department may include additional notice which may involve:

(a) through (c) remain the same.

~~(2)~~ (3) Notice under (1) and (2) of this rule shall contain the information required under ARM 17.30.106(3).

~~(3)~~ (4) If there is significant public interest in a proposed action under this rule, the department shall set a public hearing, which must be scheduled not less than 30 days after the hearing has been given public notice pursuant to (1) and (2) of this rule.

~~(4)~~ (5) The deadline for written comment is 30 days from the date of issuance of the public notice pursuant to (1) and (2) or, if a public hearing is conducted pursuant to ~~(3)~~ (4) of this rule, 14 days after the date of the hearing.

~~(5)~~ (6) A project applicant who has filed an application for a permit with the United States Army Corps of Engineers under 33 USC section 1344, as amended, to place dredged or fill material in navigable waters meets the The requirements of this section are met if the an application for a permit under 33 USC 1344 is given public notice by the United States Army Corps of Engineers, and the public notice contains a statement referencing the department's certification responsibility under section 401 of the federal Clean Water Act, 33 USC section 1341, ~~as amended~~ and the department has received a complete application under ARM 17.30.103.

~~(6)~~ (7) The department shall make its final decision within 30 days a reasonable amount of time, not to exceed one year after the close of the comment period, as determined pursuant to ~~(4)~~ (5) of this rule ~~or~~, if the project requires public notice under 33 USC section 1344, as amended, within 30 days a reasonable

amount of time, not to exceed one year after the close of the comment period set by the United States Army Corps of Engineers pursuant to (6).

AUTH: 75-5-401, MCA

IMP: 75-5-402, ~~75-5-403~~, MCA

REASON: The proposed amendments are necessary to clarify and update public notice requirements and public comment timeframes for the department's tentative Section 401 certification determinations. Applicants and other agencies with jurisdiction should be made aware that 401 certifications are being publicly noticed. The requirement to publicly notice in local newspapers was stricken because the department's website, emails, and mailings have proven far more effective at disseminating the public notice to interested parties and making the general public aware of pending department actions. The requirement to publish the notice once weekly for two weeks is also stricken because the notice will be published for two consecutive weeks on the department's website. The Army Corps of Engineers, which is the primary authorizing federal agency associated with 401 actions, only publicly notices online. These amendments are necessary to allow the department to issue a joint public notice with the Army Corps of Engineers making certification information more accessible to the public by placing all the federal and state information in the same location instead of spread across federal and state webpages.

17.30.109 APPEAL TO THE BOARD (1) remains the same.

(2) If a decision of the department made under ARM 17.30.108 undergoes review by the board under this section, the department shall notify the licensing or permitting agency that certification is ~~denied~~ suspended for the period in which the department's decision is under review by the board.

(3) remains the same.

AUTH: 75-5-401, MCA

IMP: 75-5-402, 75-5-403, MCA

REASON: The change in ARM 17.30.109(2) is necessary to clarify the status of the department's certification when the decision is appealed to the board. Upon appeal, the department's certification decision is suspended while the decision is under review by the board. The use of the word "denied" erroneously suggests that the applicant would have to reapply for the state's certification.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to sscherer@mt@gov, no later than 5:00 p.m. September 21, 2018. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supply; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wind energy, wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Sandy Scherer at sscherer@mt.gov, or may be made by completing a request form at any rules hearing held by the department.

6. Sarah Clerget, attorney for the board, or another attorney for the Agency Legal Services Bureau, has been designated to preside over and conduct the hearing.

7. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

8. With regard to the requirements of 2-4-111, MCA, the board has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ Edward Hayes

EDWARD HAYES

Rule Reviewer

BY: /s/ Christine Deveny

CHRISTINE DEVENY

Chairman

Certified to the Secretary of State, August 14, 2018.